Mohamad Karim bin Bujang v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO SRA-42–5/12 OF 2012
RHODZARIAH BUJANG J
31 JULY 2013

Criminal Procedure — Conviction — Sentence — Appeal against — Human trafficking — s 51A of the Criminal Procedure Code — Non-compliance of — Whether established — Whether appellant deprived right to evaluate prosecution's evidence with regards to warrants of commitment and notes of proceedings of three Indonesians taken by sessions court judge — Whether investigating officer failed in his promise to appellant to charge him with lesser charge — Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 s 26J — Criminal Procedure Code s 51A

The appellant was convicted for human trafficking of three Indonesians under s 26J of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('Act'). He was sentenced to two years imprisonment and fined RM10,000, in default five months imprisonment. In this case, the prosecution had proven that the appellant was detained whilst conveying the three Indonesians in a car registered in his name. Prior to this trial, all three Indonesians had been charged and convicted of the offence of illegal entry. In this appeal, the appellant raised the following three grounds to reverse the conviction entered: (a) non-compliance with s 51A of the Criminal Procedure Code; (b) failure to provide the appellant, for their evaluation, the prosecution's evidence with regards to the warrants of commitment for the three Indonesians and the notes of proceedings in relation to their evidence taken by the sessions court judge; and (c) failure of the investigating officer ('PW6') to honour the promise made to the appellant to charge him with a lesser charge under the Commercial Vehicle Licensing Board Act 1987.

Held, dismissing the appeal against conviction and sentence:

(1) Despite the mandatoriness of s 51A from the use of the word 'shall' in its opening sentence, non-compliance with it does not vitiate the trial. When an accused person requests for the documents covered by that section, the prosecution must supply them and an unreasonable refusal to do so would and can be held adversely against them if they chose to be stubborn about it. But where the accused did not make such a request and at the trial he was given the opportunity to examine the documents beforehand (as in this case) and to voice his objection (if any) on them and was further not prejudiced by not being given them in advance (as in

this case), then the trial could not be a nullity on account of non-compliance with the section (see para 7).

(2) Warrants are court orders and official records of proceedings which the court must presume to be genuine and true under s 80 of the Evidence Act 1950 as well as s 114 thereof which further presumes under Illustration (e) that judicial and official acts have been regularly performed. The tendering of these court documents by the registrar of the subordinate court ('PW3') sufficed to invoke the legal presumptions under the aforesaid sections without a need for more (see para 8).

(3) Although the facts of the case showed that the appellant had also committed a lesser offence of conveying passengers without any license from the Commercial Licensing Board, the promise, even if it were made by PW6 to charge him for that lesser offence, when it was not honoured, could not amount to anything under the law. It could not vitiate the trial and impinge the conviction because the fact was that he pleaded not guilty to the more serious charge. Further, the failed promise, if it were made, did not prejudice the trial at all and could not be used to overturn his conviction (see para 9).

[Bahasa Malaysia summary

Perayu disabitkan kesalahan menyeludup masuk tiga orang warga Indonesia di bawah s 26J Akta Anti Pemerdagangan Orang dan Anti Penyeludupan Imigran 2007 ('Akta'). Dia dijatuhkan hukuman penjara dua tahun dan didenda sebanyak RM10,000, jika gagal lima bulan penjara. Dalam kes ini, pihak pendakwaan telah membuktikan bahawa perayu ditangkap ketika membawa tiga orang warga Indonesia tersebut di dalam kereta yang didaftarkan atas namanya. Sebelum perbicaraan ini, ketiga-tiga warga Indonesia tersebut telah dituduh dan disabitkan atas kesalahan kemasukan secara haram. Dalam rayuan ini, perayu membangkitkan tiga alasan berikut untuk mengakas sabitan iaitu: ketidakpatuhan s 51A Kanun Tatacara Jenayah; kegagalan untuk memperuntukkan perayu, bagi tujuan penilaian, keterangan pihak pendakwaan bagi waran pengkomitan ketiga-tiga warga Indonesia dan nota-nota prosiding bagi keterangan mereka yang mana telah diambil oleh hakim mahkamah sesyen; dan kegagalan pegawai penyiasat ('PW6') untuk menunaikan janji kepada perayu untuk menuduhnya dengan pertuduhan yang lebih ringan di bawah Akta Lembaga Pelesenan Kenderaan Perdagangan 1987.

Diputuskan, menolak rayuan terhadap sabitan dan hukuman:

(1) Tanpa mengira kewajipan s 51A bagi penggunaan perkataan 'shall' dalam ayat mukadimahnya, ketidakpatuhan terhadapnya tidak melemahkan perbicaraan. Apabila seseorang tertuduh meminta dokumen yang dicakupi oleh seksyen tersebut, pihak pendakwaan mestilah

menyediakannya dan keengganan yang munasabah untuk berbuat demikian akan dan boleh menentang mereka jika mereka berdegil mengenainya. Tetapi di mana tertuduh tidak berbuat permohonan sedemikian dan ketika perbicaraan dia diberikan peluang untuk memeriksa dokumen-dokumen terlebih dahulu (seperti dalam kes ini) dan menyuarakan bantahan (jika ada) ke atas mereka dan selanjutnya tidak diprejudiskan kerana tidak diberikan kesemuanya terlebih dahulu (seperti dalam kes ini), dengan itu, perbicaraan tidak boleh terbatal atas sebab ketidakpatuhan seksyen tersebut (lihat perenggan 7).

(2) Waran adalah perintah mahkamah dan rekod-rekod rasmi prosiding yang mahkamah menganggap semestinya tulen dan benar di bawah s 80 Akta Keterangan 1950 dan juga s 114 yang selanjutnya menganggap di bawah Ilustrasi (e) bahawa tindakan-tindakan kehakiman dan rasmi telah dijalankan secara teratur. Dokumen-dokumen mahkamah oleh pendaftar mahkamah bawahan ('PW3') cukup untuk membangkitkan anggapan undang-undang di bawah seksyen-seksyen tersebut tanpa keperluan untuk lebih lagi (lihat perenggan 8).

(3) Walaupun fakta kes menunjukkan bahawa perayu telah melakukan kesalahan yang lebih ringan iaitu membawa penumpang-penumpang tanpa lesen daripada Lembaga Pelesenan Kenderaan Perdagangan, janji tersebut, jika pun dibuat oleh PW6 untuk menuduhnya dengan tuduhan yang lebih ringan, jika tidak ditunaikan, tidak terjumlah kepada apa-apa di bawah undang-undang. Ia tidak boleh melemahkan perbicaraan dan memberi kesan kepada sabitan kerana fakta adalah bahawa dia mengaku tidak bersalah ke atas pertuduhan yang lebih berat. Selanjutnya, janji yang tidak ditunaikan tersebut, jika dibuat, tidak memprejudiskan perbicaraan sama sekali dan tidak boleh digunakan untuk mengakas sabitannya (lihat perenggan 9).]

Notes

For cases on sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1792–1794.

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312; [2010] 4 CLJ 265, FC (refd)

Nujim bin Matusin v PP [2012] MLJU 677; [2012] 1 LNS 539, HC (refd)

PP v Venkatakrishnan a/l Radhakrisnan [2010] MLJU 1848; [2010] 1 LNS 1783, HC (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 2, 26J

Commercial Vehicles Licensing Board Act 1987

Criminal Procedure Code ss 51A, 399, 402A

Evidence Act 1950 ss 80, 114(e)

Abang Mohd Tosen (Mohdtosen Advocates) for the appellant.
Musli bin Ab Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang J:

[1] The appellant was charged in the sessions court for human trafficking of in three Indonesians under s 26J of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the said Act') and after a full trial was convicted and sentenced to two years imprisonment and fined RM10,000 in default five months imprisonment.

[2] In summary the evidence adduced by the prosecution shows that the appellant was caught whilst conveying the three Indonesians in his car at 9th Mile, Sri Aman-Sibu Road, Sri Aman. All three had been charged and convicted of the offence of illegal entry into the state by another sessions court before the trial of the appellant. The car driven by the appellant that day was registered in his name. Evidence of their convictions were tendered by the registrar of the subordinate court as was the ownership of the car by the appellant through an officer of the Road Transport Department. The incriminating evidence of the three Indonesians (exh P9) against the appellant were separately taken, by way of depositions, by another sessions court judge. The elements of the charge under the said s 26J have therefore been proved following the definition of 'Smuggling of migrants' under s 2 of the said Act which provides as follows:

> (a) arranging, facilitating or organizing, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and
>
> (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a).

[3] The appellant in his defence said that he was asked by a friend to bring the Indonesians to Mukah who told them that they were workers and runaways from a plantation company, Mas Ranti Plantation. He said he did not know whether they have passports. In cross-examination he admitted receiving money from them for the transportation and confirmed that he did not ask if they have passports. To a question by the court, he said that they did not speak with an Indonesian slang and he thought they were from Mukah.

[4] At the hearing of the appeal before me, the appellant's counsel raised two grounds which he submitted should reverse the conviction entered:

(a) non-compliance with s 51A of the Criminal Procedure Code;

(b) non-evaluation of the evidence of the prosecution's evidence with regards to the warrants of commitment for the three Indonesians and the notes of proceedings taken of their evidence by the other sessions court judge and to account for the contradiction in the evidence of PW1 and PW6. PW1 was the arresting officer who testified that he effected the arrest of the appellant at the said road and detained the three Indonesians who were with the appellant in his car at the material time; and

(c) non-honouring of the promise by the investigating officer ('PW6') to charge the appellant with a lesser charge under the Commercial Vehicles Licensing Board Act 1987.

NON-COMPLIANCE WITH S 51A

[5] The appellant was unrepresented at the trial and it is not anyone's fault. The notes of proceedings at p 1 of the appeal record states that 'he do not wish to engage counsel for today's proceedings'. The prosecution candidly admitted, in the submission of the learned deputy public prosecutor, Musli bin Ab Hamid that he was not served with the relevant documents in respect of the charge but that, said the learned deputy public prosecutor, is not fatal to the proceedings because before each document were tendered as evidence, the same was explained to him and he said that he understood them and have no objection to their tendering. He cited the case of *Nujim bin Matusin v Public Prosecutor* [2012] MLJU 677; [2012] 1 LNS 539 where it was held that failure to comply with this section does not render the evidence inadmissible. The appellant's counsel in turn referred me to *Public Prosecutor v Venkatakrishnan a/l Radhakrisnan* [2010] MLJU 1848; [2010] 1 LNS 1783 which upheld the decision of the learned sessions court judge in rejecting documentary evidence which were not served on the defence as required by the said section.

[6] It is indeed true as is stated in *Venkatakrishnan*'s case that the object of s 51A is to prevent a trial by ambush. It is also a guarantee for a fair trial as stated by the Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312; [2010] 4 CLJ 265, the full text as it appears at p 288 as follows:

> In our view, this new provision strengthens the guarantee of a fair trial in providing the adequate facilities as purported in the General Remarks document of the Human Rights Committee that was read to us. Section 51A of the CPC has, in our opinion, made the battlefield move level, to preserve the 'equality of arms principle', ensure the fairness of a trial and ultimately uphold the very integrity of the courts in

its administration of criminal justice. This should also be considered in the light of our criminal justice system where the burden of proof lies throughout on the prosecution, which, together with the common law principle of presumption of innocence, safeguard that fairness.

[7] However, despite the mandatoriness of that section from the use of the word 'shall' in its opening sentence, I am of the view that non-compliance with it does not vitiate the trial and in this regard I share the view of David Wong Dak Wah J (as His Lordship then was) in *Nujim*'s case which distinguishes between provisions which regulate the manner of trial such as ss 399 and 402A of the Criminal Procedure Code and that which provides for its conduct such as s 51A. The latter is merely procedural, said His Lordship whilst the former, evidential. I would also add that this reasoning does not mean that the said section is enacted in vain. It simply means that when an accused person requests for the documents covered by that section, the prosecution must supply them and an unreasonable refusal to do so would and can be held adversely against them if they chose to be stubborn about it. But where the accused did not make such a request and at the trial he was given the opportunity to examine the documents beforehand (as in this case) and to voice his objection (if any) on them and was not prejudiced by not being given them in advance (as in this case), then the trial could not be a nullity on account of non-compliance with the section.

NON-EVALUATION OF THE EVIDENCE

[8] The complaint here is with regards to the warrants of commitment of the three Indonesians and the notes of proceedings of learned sessions court judge who examined them for not being given to the appellant and not referred to the investigating officer at the trial. With respect, there is no merit in this ground because the warrants are court orders and the official record of the proceeding which, as rightly submitted by the learned deputy public prosecutor the court must presume to be genuine and true under s 80 of the Evidence Act 1950 as well as s 114 thereof which further presumes under Illustration (e) that judicial and official acts have been regularly performed. The tendering of these court documents by the registrar of the subordinate court ('PW3') sufficed to invoke the legal presumptions under the aforesaid sections without a need for more. As for counsel's contention that there are contradictions in the evidence of PW1 and PW6, there was no particularisation of the alleged contradictions and on my own reading of their evidence, I failed to see any material contradictions which would affect their credibility and compromised the case for the prosecution.

THE FAILED PROMISE

[9] Although the facts of the case adduced by the prosecution show that the

appellant had also committed a lesser offence of conveying passengers without any license from the Commercial Licensing Board, the promise even if it were made by PW6 to charge him for that lesser offence, when it was not honourned could not amount to anything under the law — it could not vitiate the trial definitely and impinge on his conviction because the fact is he pleaded not guilty to the more serious charge, not that he was induced by it to plead guilty to that lesser charge.

[10] Again, as before, that failed promise, if it were made, did not prejudice the trial at all and could not be use to overturn his conviction which in my view is safe. Thus, I would dismiss his appeal against conviction. As for the sentence, his counsel did not address me on it. Given that the maximum penalty under the law is five years imprisonment and a maximum fine of RM250,000 or both imprisonment and fine, the sentence of two years imprisonment and the RM10,000 fine is not manifestly excessive, considering that no good mitigating factors were raised by the appellant before the learned sessions court judge on the day of sentencing. Accordingly his appeal against sentence is similarly dismissed.

Appeal against conviction and sentence dismissed.

Reported by Ashgar Ali Ali Mohamed